

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our)	GN Docket No. 09-51
Future)	
)	WC Docket No. 07-135
Establishing Just and Reasonable Rates for)	
Local Exchange Carriers)	
)	WC Docket No. 05-337
High-Cost Universal Service Support)	
)	CC Docket No. 01-92
Developing an Unified Intercarrier)	
Compensation Regime)	
)	CC Docket No. 96-45
Federal-State Joint Board on Universal)	
Service)	WC Docket No. 03-109
)	
Lifeline and Link-Up)	WT Docket No. 10-208

Universal Service Reform – Mobility Fund

Opposition to Petition to Reconsider the Commission’s Tribal Engagement

Requirements

The National Tribal Telecommunications Association (NTTA) files the following comments in response to and in opposition to the Rural Local Exchange Carriers’ Petition for the FCC to reconsider the Commission’s Tribal

Engagement requirements in the proposed 54.313(a)(9) provisions pertaining to the provision of services on Tribal lands.

I. Introduction

The National Tribal Telecommunications Association is comprised of the 12 Indian Tribes that have created their own telecommunications service (Cheyenne River Sioux, Tohono O’odham, Gila River, San Carlos Apache, Fort Mojave, Salt River Pima Maricopa, Mescalero Apache, Hopi, Standing Rock Sioux, Warm Springs, Crow Creek Sioux, and Pine Ridge Sioux tribal nations.)

II. NTTA responds to the objections raised by the Petitioners.

A. Petitioner: The requirement imposed on wireline ETCs to “meaningfully engage” Tribal governments is not supported by the record and, therefore, it is arbitrary and capricious.

Response: The Petitioners have purposefully ignored the record of comments filed by Tribal Nations and organizations asking for consultation to promote Tribal sovereignty and to alter regulatory “underservice” on Tribal lands. (See National Tribal Telecommunications Association’s policy filings.)

The Petitioners Misrepresent Tribal Policy Imperatives

The Petitioners have misstated Tribal and organizations’ policy positions in their petition.

“On the other hand, the Commission ignored the comments of the National Tribal Telecommunications Association and the reply comments filed by a group of rural local exchange carriers which make clear that a consultation obligation on all ETCs serving Tribal lands is not necessary to promote the universal deployment of broadband service.”¹

On October 18, 2011, the National Tribal Telecommunications Association, representing 12 Tribes; the National Congress of American Indians, representing over 300 Tribes; and the Affiliated Tribes of Northwest Indians, representing 57 Tribes, asked the Commission to promote Native sovereignty with specific measures to effect change in the provisioning of regulatory service (or lack of service) to Native Nations. (NTTA, NCAI and ATNI also sought a targeted Commission program to promote the public switched, public safety, mass media and mobility broadband networks in Tribal communities as well as a hold-harmless for Tribal services from proposed cuts in the USF and ICC reforms).

The Tribal communities specifically requested:

“Native Nations would like the FCC to require ETCs to attain permission from Native Nations to serve Native communities, and require commercial consultation on quality of service in and public interest obligations to Native communities.”²

This is 180 degrees opposite from the Petitioner’s depiction of NTTA’s, NCAI’s and ATNI’s policy position on commercial “engagement” with Tribal

¹ Petition for Reconsideration, filed by Blooston, Mordkofsky, Dickens, Duffy, Prendergrast, LLP on behalf of 23 RLECs serving Tribal Lands, December 29, 2011.

² Ex Parte comments by the National Tribal Telecommunications Association, the National Congress of American Indians, and the Affiliated Tribes of Northwest Indians, October 18, 2011.

governments. The Petitioners purposely misrepresent the Tribal Nations' unified request for consultation and commercial engagement with Tribal governments. This common imperative was supported by over 300 Tribes.

Commercial Engagement with Tribal Governments

B. Petitioners: *The requirement for wireline ETCs to meaningfully engage tribal governments is not supported by the record, and is thus arbitrary and capricious.*

Response: *A sufficient Record has been developed to justify the Commission's Tribal Engagement Policy.*

In paragraph 31 of the proceeding *In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41, the Commission asked for comments about the nature of consultation with Tribal governments in ETC designations.

NTTA responded:

"NTTA has commented on consultation with Native Nations by regulatory providers. As a pre-condition for ETC designation process, the applicant should consult with the Tribal government or Native community first, describe the service plan, how the provider may plan to serve the entire community, the processes to address quality and quantity complaints by individuals and the Tribe, and how the regulatory provider will adhere to attaining legal rights of way and all permitting requirements of the Tribal government or Native community. The applicant should agree that failure to comply with the terms of the ETC application or to consult with the Tribal government or Native community will cause the FCC to divest the provider of their ETC status and their receipt of support from Section 254. The ETC applicant should also agree to re-invest or spend its support and recovery funds within the Tribal or Native community Section 254 funding was derived from."

In addition, in paragraph 75, the Commission asked about the most productive and efficient manner in which the FCC can structure a consultation process unique to the Commission. The Commission also asked how it could consult with Native Nations to achieve a meaningful exchange of information and perspectives. And in paragraph 76, the Commission asked for specific recommendations.

In response, NTTA urged an improved Nation-to-Nation consultation between the FCC and Tribal governments—referencing the Commission’s Trust policy.³ NTTA went on to describe specific levels of consultation essential for Tribes to alter historic underservice and become more self-sufficient in influencing the provisioning of regulated service that is not being provided to Tribal lands:

“NTTA recommends the FCC undertake three types of consultations: 1) educational seminars that highlight regulatory sectors, e.g. wireline, wireless, cable, satellite, mass media, public safety, that inform the Native community about technology, service, and regulatory framework for each sector; 2) consultations regarding on-going regulatory policy proposals and impending changes, particularly rulemakings or enforcement actions that will materially or significantly impact Tribal lands and Native communities; and, 3) consultations that monitor progress of regulatory policy and commercial service implementation affecting tribal communities. In the last category of monitoring regulatory and commercial implementation of service and policy, the FCC must establish a mechanism for direct tribal recommendations and comment on regulatory policy modifications and commercial service adjustments, with a clear and direct sovereign pathway for recommended enforcement by the FCC on behalf of Tribal governments and Native communities.

NTTA recommends the FCC require regulatory providers that serve Native communities to consult with Tribal governments or Native organizations that represent Native communities under the principle that regulatory services are delegated authority to commercial providers implementing the public interest requirements of the Communications Act.

³ NTTA comments, *In the Matter of Improving Communications Services for Native Nations*, CG Docket 11-41, page 29.

For specific regulatory consultations, the FCC should hold regional meetings or periodic telephonic conferences that highlight the detailed and germane regulatory proposals that will impact Tribal lands and Native communities.

As a matter of Tribal interest and inclusion, consultation on regulatory policy should extend beyond Tribal governments and should engage Tribal communities. It should not preclude service, regional and industry organizations that have a strong record of expertise implementing telecommunications solutions.”⁴

Finally, in the Mobility Fund NPRM, NTTA commented:

“The FCC should require Mobility Fund providers to consult with Native governments. An essential component of Native sovereignty is the process of consultation. While federal trust principles require government-to-government consultation with Native governments, the notion of consultation with tribal governments for commercial transactions affecting an entire community is emerging. The National Congress of American Indians passed a resolution (becoming the official policy of Indian country)⁵ urging the FCC to set aside a sufficient amount from the Broadband Mobility Fund to assist Tribes with essential safety-net infrastructure predicated on a 4G platform. That resolution included a requirement for any Mobility Fund provider serving Native communities to consult with the Native government to better meet the needs of the community and to obtain all the necessary legal permissions for bringing service and infrastructure to Native communities.”⁶

In NTTA’s eyes, the FCC has a full record of Tribal views on Tribal consultation and commercial engagement with Tribal Governments. That the Petitioners falsely depict NTTA’s clear and consistent admonition to embrace commercial consultation within the Commission’s Tribal policy imperatives demonstrates an

⁴ Id, page 30.

⁵ NCAI resolution ABQ-10-061 calling for Federal support for Native broadband development and earmarking Broadband Mobility Fund for Native communities.

⁶ Id, page 24.

emblematic disregard for Tribal sovereignty, public interest, and sound business sense.

C. Petitioners: *A consultation obligation on all ETCs serving Tribal lands is not necessary to promote the universal deployment of broadband service. The Commission has not shown such engagement is important or necessary in any way, let alone "vitally important," to advance the goal of universal service.*

Response: *ETC Engagement is vitally important to Tribal Nations and essential for meeting public interest obligations in hard-to-serve, remote, or high-cost areas. Failure to Engage Tribal Governments will perpetuate the history of underservice on Tribal Lands.*

The FCC has demonstrated throughout policy ⁷ and regulatory decisions that it recognizes action on Tribal underservice is "vitally important" to advance the goal of universal service. In the Commission's Order on Reconsideration for the Standing Rock ETC petition⁸, it strongly emphasized:

"We also find that this conclusion aligns with the nature of Tribal sovereignty. Congress usually intends that its "statutes . . . be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit."⁹ This canon is "rooted in the unique trust relationship between the United States and the Indians."¹⁰ The Commission has recognized its "fiduciary duty to conduct [itself] in matters affecting Indian tribes in a manner that protects the interest of the tribes" and its corresponding obligation to interpret "federal rules and policies . . .

⁷ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) ("Tribal Policy Statement").

⁸ Standing Rock Order on Reconsideration, WC Docket 09-197, June 21, 2011, para. 15.

⁹ *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985).

¹⁰ *Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985).

in a manner that comports with tribal sovereignty and the federal policy of empowering tribal independence.”¹¹

NTTA, the Commission, and the General Accounting Office have repeatedly underscored the lack of connectivity for both voice dial tone and broadband in Native America.¹²

In the Standing Rock Order on Reconsideration¹³, the Commission reiterated the Commission’s special role in promoting universal service goals on Tribal Lands:

“These goals take on acute importance when considering a designation on Tribal lands, where the Commission has assumed a special role in “promoting access to wireless radio and other communications services,” given that rates of telephone and broadband penetration are “significantly lower” on Tribal lands than elsewhere in the United States.”¹⁴

In the Commission’s First Order on Rural Radio Service providing a Tribal priority for licensing¹⁵, the Commission said:

“Tribes have an obligation to ‘maintain peace and good order, improve their condition, establish school systems, and aid their people in their efforts to acquire the arts of civilized life,’ within their jurisdictions,¹⁶ and that the Commission has a longstanding policy of promoting tribal self-

¹¹ *Twelfth Report and Order*, 15 FCC Rcd at 12266, para. 119.

¹² General Accounting Office report on Tribal Access to Telecommunications, 2006 found that Tribes are likely to have less than 10 percent access to Broadband.

¹³ Standing Rock Order on Reconsideration, para 13.

¹⁴ *Improving Communications Services for Native Nations by Promoting Greater Utilization of Spectrum over Tribal Lands*, WT Docket No. 11-40, Notice of Proposed Rulemaking, FCC 11-29, at 3–4, paras. 4–5 (rel. Mar. 3, 2011); *see also Improving Communications Services for Native Nations*, CG Docket No. 11-41, Notice of Inquiry, FCC 11-30 (rel. Mar. 4, 2011); NTTA Referral Comments at 1.

¹⁵ 47 U.S.C. § 307(b) (“Section 307(b)”).

¹⁶ S.Rep. No. 698, 45th Cong., 3d Sess. 1-2 (1879) (quoted in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 140, 102 S.Ct. 894, 903, 71 L.Ed.2d 21 (1981)).

*sufficiency and economic development, as well as providing adequate access to communications services to Tribes.*¹⁷”

In the 12th Report and Order¹⁸, the FCC said:

“The Commission found the enhancement of tribal communities’ access to telecommunications services consistent with its obligations under the Act to preserve and advance universal service, and its obligations under the historic federal trust relationship between the federal government and federally-recognized Indian tribes to encourage tribal sovereignty and self-governance.”¹⁹

By any application or interpretation of the Commission’s consistent findings, application of the Act’s Title I and II imperatives, Section 214 or Section 254 principles, it is apparent Tribes have not been afforded a “fair, efficient, and equitable distribution” of broadband service with regard to Tribal lands.²⁰

In previous comments to the FCC, NTTA has asked the FCC to implement a second variety of “commercial consultation” beyond Nation-to-Nation consultation to help Tribal communities to participate in the deployment of regulatory service on Tribal Lands. By participating in targeting service and coordinating key institutions in the tribal community, Tribes may be able to improve the quality of regulatory service provided to the Tribal Nation. Since Tribal areas are indisputably the worst served communities in America, ETC

¹⁷ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

¹⁸ Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking, 15 FCC Rcd 12208 (2000) (*Twelfth Report and Order*).

¹⁹ *Id.* at 12222, para. 23, 12222-24, para. 26.

²⁰ Referencing the Commission’s reasoning in establishing a Tribal Priority for mass media licensing under Section 307(b) of the Act.

engagement with the representative government and advocate for an insular community improves the efficiency of the universal service delivery system. Consistent with the FCC's Trust policy to consult with Tribes on policies with "material" impact on Tribes²¹, ETCs, with public interest responsibility, should consult with Tribes on service practice, policies and plans that have "material" impact on the Tribe.

The Commission cannot turn back on the beginning actions that can alter disparity of communications access on Tribal Lands. It must take all necessary regulatory and policy measures to bring parity of broadband technology and service to Native communities to fulfill the universal service mandate of the Communications Act and meet the Commission's Federal Trust responsibilities.

Why is Tribal Engagement Important?

The Commission has an opportunity to address "underservice" or improve efficiency of service to "unserved areas" by engaging with Tribal Consumers

The Commission has a public interest obligation to monitor and ensure the provision of universal service to all Americans.²² Section 254(b)(3) focuses on

²¹ *Ibid.*

²² 47 U.S.C. 254.

access in rural and high cost areas, with particular emphasis on “low-income consumers and those in rural and high-cost areas” having access to telecommunications and information services “that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.”

Consumers are rarely afforded an opportunity to participate in service policies that impact them.

Tribal communities have been historically underserved and are today the worst connected communities in the United States. Because the Federal government has a government-to-government relationship with Tribes, it is befitting that the Commission acts to improve the efficiency of regulatory service by promoting ETC engagement with the Tribal government.

Engaging with Tribal governments is the most efficient means of assessing the needs of entire insular communities, and, for assessing fulfillment of public interest obligations. In addition, since the Commission’s Trust policy requires the Commission to consult with Tribes on policies that have a significant or

material impact on Tribes²³, regulatory providers that consult with Tribes on service that have a significant or material impact on the Tribal community help the Commission further its Trust obligations.

Public Safety Obligations and Requirements Necessitate Engagement between ETCs and Tribal Governments

In the Matter of Improving Communications Services for Native Nations, CG Docket 11-41, paragraphs 37, 38, 41,42 and 45, the FCC asked how public safety and emergency communications are provisioned on Tribal lands and on the status of current plans for public safety and emergency communications on Tribal lands. NTTA commented in response about the need for public safety planning, infrastructure, coordination, 911 mapping, and resource needs for Tribal lands.

NTTA replied:

“Many Native communities are not consulted on emergency service planning. PSAP design are in need of reform and resourcing for PSAP service are frequently the last funded and first cut budget options by states. Most Native communities are not mapped for E-911 addresses. GPS based residential coordinates are not available in most Native communities. Of course the paramount obstacle is sufficient funding and resourcing to solve these issues. Timely coordination of law enforcement, fire fighting and medical response services is always a criticism in Native communities, due to lack of resources, lack of appropriate coordination, lack of training, lack of equipment and lack of modern equipment, lack of interoperability between emergency services, and lack of planning and community coordination.”²⁴

²³ *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, Policy Statement, 16 FCC Rcd 4078, 4080-81 (2000) (“*Tribal Policy Statement*”).

²⁴ *In the Matter of Improving Communications Services for Native Nations, CG Docket 11-41*, at page 25.

What is the missing piece to this puzzle? There is recurring failure to include ETC participation in planning public safety reform and deployment in Tribal communities. This is another essential reason why ETCs serving tribal lands should engage with Tribal governments to coordinate public safety planning and deployment. To argue there is no role for Tribal government engagement with regulatory carriers is to demonstrate the fundamental flaw of current public safety, emergency and homeland security policy in rural and Tribal areas.

Anchor Institutions Necessitate Engagement Between Tribal Governments and ETCs

Anchor institutions are essential interface between Tribal government and the Native community. Anchor institutions provide essential public service to community residents, provide important information, and are catalyst to social networking and wellness strategies. They often are the leading edge of community economic development, helping to stimulate private sector enterprise. That being the case, connecting anchor institutions (governmental service, health, education, job skills and entrepreneurial training, economic development and social service) is essential in Native communities. One

important note is that anchor institutions will be key to enabling rural residents to access broadband and the Internet, particularly if Native residents cannot afford residential broadband service. In addition, broadband adoption can be best facilitated through anchor and public institutions, where public computer access is provided. There, Native residents can learn how best to utilize broadband and the Internet and acquire digital literacy—if the Tribe plays an active role in supporting digital literacy and broadband adoption.²⁵

Because of the lack of wherewithal by community members to subscribe to residential broadband service, Tribal telcos are responsible for providing broadband to a wide range of anchor institutions that render essential community service and provide resource information vital to community members. This public service obligation distinguishes commercial carriers from Tribally-owned carriers.

For instance, Tribal telcos are obligated to provide state-of-the-art technology and service to public anchor institutions in their communities, such as Government offices; schools; libraries; public safety offices and emergency services; health clinics; business and economic development offices and entities; community centers; senior centers; Headstart centers; waste and sewage and power authorities; Boys and Girls clubs; food commodity centers; fire-fighting

²⁵ Ibid, page 18.

towers; and a range of federal offices operating on Tribal lands, such as BIA, Fish and Wildlife Service, EPA, Homeland Security, and other resource and support authorities on Tribal lands.²⁶

The availability of telemedicine connection is vital to the wellbeing of Native rural communities. However, the challenge is the lack of broadband capacity of existing PSTN networks. While Broadband capacity varies from local market to local market, higher end telemedicine—transmission of EKG and other medical imaging—may require up to 1 gigabit throughput capacity, which are frequently unattainable in remote health clinics.²⁷

Indeed, the Telecommunications Act amendments underscored the vital role of certain anchor institutions. Section 254(c)(3) said: “In addition to the services included in the definition of universal service under paragraph (1), the Commission may designate additional services for such support mechanisms for schools, libraries, and health care providers for the purposes of subsection (h).”

The above discussion underscores the challenge of connecting Tribal lands. As an insular community, the full benefit of and adoption of broadband

²⁶ NTTA’s comments, FNRPM for: *In the Matter of Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, pages 14-15.

²⁷NTTA comments in: *In the Matter of Improving Communications Services for Native Nations*, page 18.

access requires a combined residential and public anchor institution plan. The only way that broadband adoption and anchor institution deployment can be attained is through Tribal government engagement with the regulatory provider. The FCC's promotion of Tribal engagement therefore is essential to the fulfillment of Section 254 universal service public interest obligations.

A Native Focused Broadband Mapping Strategy Requires Coordination Between ETCs and Tribal Governments

NTTA has documented broadband mapping errors in New York and Washington, and mapping access issues in Arizona. Broadband mapping greatly impacts the comprehensive deployment of broadband in unserved and underserved communities. Lack of knowledge of infrastructure reach and broadband capacity will delay resource driven broadband solutions. As NTTA stated in its FNRPM comments: "The Department of Commerce's state-wide Broadband Mapping Program may be able to provide adoption and utilization information, but may need specific prompts to gather relevant information. (NTTA notes that Native community broadband mapping by states has been largely unsuccessful and thus NTTA has prescribed a specific title of its proposed Native Nation Broadband Fund to getting the Native Broadband

Mapping done right, with emphasis on identifying barriers and tailing in feedback on broadband adoption and utilization barriers and results.)”²⁸

A comprehensive Native broadband mapping scheme cannot be completed without coordination and cooperation between ETCs and Native governments. ETC engagement with Tribal governments is essential to ensuring the right federal (and state) resources are brought to bear on broadband underservice.

D. *Petitioner: Requirement that ETCs demonstrate compliance with Tribal business and licensing requirements, including certificates of public convenience and necessity from Tribal governments, violates state and federal law, the Communications Act and it is beyond the scope of the Commission’s jurisdiction.*

Response: Failure to comply with permits for Tribal rights of way and legal permits violates the sovereignty of Tribal Nations and implicates the Commission in illegal activity on Tribal lands. The Federal government has jurisdiction within Tribal lands and is ultimately charged with responsible for issuing and monitoring certificates of public convenience and necessity.

²⁸ Ibid, at page 19.

The Federal Communications Commission Has A Compelling Interest and Obligation to Protect and Promote the Public Interest on Tribal Lands.

Petitioners cannot hide behind state jurisdiction with regard to public interest and universal service obligations on Tribal Lands.

The Communications Act gives the Commission express authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.”²⁹ The Act also prescribes “it shall be the duty of every common carrier... to furnish such communication service upon reasonable request...”³⁰ In the case of Tribal communities, if Tribal governments are making reasonable requests for full and comprehensive service to its community, it appears reasonable that common carriers are required to “engage” with the governmental representative of consumers on provisioning and quality of service to a Tribal community.

The FCC has a compelling interest to monitor ETC compliance with public interest obligations on Tribal Lands.³¹ States have little motivation to enforce

²⁹ 47 U.S.C. 201.

³⁰ Ibid.

³¹ 12th Report and Order.

public interest on Tribal Lands.³² The Standing Rock Order on Reconsideration³³ re-emphasized the Federal interest and authority of the Commission on Tribal Lands. Here, the Commission's Title II, Sections 201, 202 and 254 charges the Commission to protect the public interest of Tribal communities by engaging Tribal governments in the public interest monitoring and consumer rights on Tribal Lands³⁴ Notwithstanding states' certification of incumbent ETCs serving Tribal Lands, the public interest obligations do not diminish or change on Tribal Lands, particularly when the record of overall regulatory service to Tribal Lands has been dismal. (NTTA recognizes and applauds the efforts of the RLECs that have met their public interest obligations on Tribal Lands.)

**ETCs as Regulatory Providers with Public Interest Obligations Cannot
Knowingly Violate Tribal Laws, Contravene Tribal Sovereignty, nor
Absolve Itself from Federal Policy Requirements on Tribal Lands.**

³²In the Standing Rock Order on Reconsideration, the Commission analyzed the Federal interest in the Section 214(e)(6) overlap with 214(e)(5) redefinition authority: "Consistent with our precedent, we conclude that, because we here designate Standing Rock to serve the part of the service area of each of the rural telephone companies that lies within the limits of our jurisdictional authority, redefinition is unnecessary and no state commission need consent before Standing Rock's designation takes effect. No party disputes that when a commission designates a carrier throughout an entire rural service area, section 214(e)(5) does not require redefinition. In the *Virginia Cellular Order*, the Commission did not need to redefine any of the rural service areas that Virginia Cellular could "serve completely."³² Nor did the Bureau suggest redefinition or state consent was necessary when it designated Hopi Telecommunications as an ETC throughout the "entire study area" of the local rural telephone company."

³³ Standing Rock Order on Reconsideration.

³⁴ 47 U.S.C. 254(b)(3).

The FCC has given special emphasis to government-to-government relations with Tribal governments.³⁵ “We are mindful of our obligation to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance” (Mescalero Apache Telecom, Inc. Order, FCC 01-13.) The Commission also recognized the substantial need to assist Native communities: “The Commission has recognized that Native American communities have the lowest reported level of telephone subscribership in America” (Sacred Winds Communications Inc. Order, DA 06-1645).

It is a basic tenet that ETCs have a duty and obligation to provide service to all customers without discrimination, with just, reasonable and affordable rates, comparable to rates in urban areas.³⁶ A telecommunications carrier must be designated as an ETC and must offer services throughout its entire service area in order to receive universal service support.³⁷

The Act is clear that carriers cannot “subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.”³⁸

³⁵ *Federal-State Joint Board on Universal Service; Promoting Deployment and Subscribership in Unserved and Underserved Areas, Including Tribal and Insular Areas, Twelfth Report and Order, Memorandum Opinion and Order, and Further Notice of Proposed Rulemaking*, 15 FCC Rcd 12208 (2000) (“*Twelfth Report and Order*”).

³⁶ 47 U.S.C. 254.

³⁷ 47 U.S.C. § 254(e) (stating that only an ETC is “eligible to receive specific Federal universal service support”).

³⁸ 47 U.S.C. 202.

The Commission, States, and all regulated carriers are required to make availableto all the people of the United States, without discrimination, ...a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges...”³⁹ No carrier shall undertake service or extension of lines without a certificate of public convenience and necessity from the Commission. Similarly, no carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby”.⁴⁰ The Act promulgates universal service obligations targeting consumers in all regions of the country and is clear that carriers must meet these obligations in order to receive universal service support.⁴¹

The FCC has the authority to define services to be covered under Section 254(c) support. The Commission has the authority to act pursuant to “such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act” 254(b)(7). The Commission has also observed that the “determination of jurisdiction over a carrier serving tribal lands is an

³⁹ 47 U.S.C. 151, Section 1.

⁴⁰ 47 U.S.C. 214(a).

⁴¹ 47 U.S.C. 214(e)(1)(A).

inquiry that will extend beyond questions of state law, and will be informed by principles of tribal sovereignty, federal law, and treaties”⁴², especially under Section 254(c)(1)(D) to the extent such telecommunications services “are consistent with the public interest, convenience, and necessity.”⁴³

With regard to the Commission requiring ETCs to comply with the legal requirements for rights-of-way and other Tribal legal permitting, Section 253(c) of the Act states: “Nothing in this section affects the authority of a State or local government to manage the public rights of way or to require fair and reasonable compensation from telecommunications providers, if the compensation is publicly disclosed by such government.”⁴⁴

Federal policy toward Tribal Nations and compliance with universal service requirements cannot be circumvented because the ETC’s was certified by a state commission. Regulated carriers should be held to the standard of public interest and respect for the sovereignty of Tribal Nations, as are required by Federal Statutes, Constitutional principles and implementing regulations. To contravene Tribal legal authority or Trust obligations would violate the Commission’s Federal Trust standing with Tribal Nations.

⁴² Twelfth Report and Order, *Id.* ¶ 125.

⁴³ NTTA comments, In the Matter of Improving Communications Services for Native Nations, CG Docket 11-41.

⁴⁴ 47 U.S.C. 253(c)

E. Petitioner: The Commission's requirement concerning marketing over-reaches Commission authority and violates the First Amendment of the Constitution of the United States.

Response: In return for receiving public funding, ETCs have to meet public interest obligations, and, as such, cannot escape public interest obligations under cover of commercial free speech rights. Public interest obligations to advertise and consult with Tribal governments are not restrictions on free speech.

Section 214(e)(1)(B) of the Act requires Eligible Telecommunications Carriers (ETCs), in order to receive universal service support, to advertise the availability of services offered under Section 254(c) and the charges therefor. The Commission's requirement to "engage" with Tribal governments is a special means of advertising the regulatory services and public interest obligations of the ETC on Tribal Lands. These advertising and engagement requirements are unique to Tribal Nations and fulfills the Section 254 special service mandate to connect Schools, Libraries and health care providers with advanced technology.⁴⁵ The Commission is given authority to apply "such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act."⁴⁶ Such commercial and public interest Engagement with Tribal

⁴⁵ 47 U.S.C. 254(b)(6) and 254(c)(3).

⁴⁶ Id, at Section 254(b)(7).

governments furthers the strong public interest of the Commission to both consult with Tribal governments and to fulfill the universal service mandates on Tribal Lands.

The RLEC petitioners are regulatory providers receiving public funding as carriers of last resort and as such cannot avoid advertisement and consultation with consumers by raising commercial free speech impediments to service consultation, especially with Tribal governments that represent the consumer interests and needs of the Tribal community. Tribal governments represent the interests of residents in underserved and unserved Tribal communities and have a public interest obligation to its those constituents. There is a substantial Federal and a Tribe substantial governmental interest in the provision (or lack of provision) of regulated advanced technology service to Tribal Lands. Yet the “engagement” provisions of the Commission may advance other statutory and governmental purposes of making more efficient use of public funding for universal service (to connect previously unconnected Tribal residents and to attain parity of technology and rates with urban and non-Tribal areas.) Arguably, consultation with a residential representative can improve efficiency of universal service and improve the quality of regulatory service lacking in most Tribal communities. Customer care engagement may save costs in the long run for the both the ETC and to the Connect America Fund. More importantly, it

permits Tribal governments to coordinate public safety and emergency service planning, educational targeting, health care provisioning, and anchor institution connectivity, as mandated by Section 254 of the Act.

NTTA concurs with and defers to the National Congress of American Indian's, Native Public Media's and Navajo Nation's legal analysis on the compelling Federal interest in Indian laws that support the Communications Act mandates to move forward to support Tribal sovereignty and assist Tribes in response to the Petitioner's legal and policy claims.

The FCC is using the Least Drastic Measure to Help Bring Regulatory Service to Tribal Consumers

The requirement for commercial engagement with a Tribal government has a fundamental and direct impact on meeting out the mandates of Title II, sections 214 and 254 of the Act. As such, the Commission's forward looking requirement for commercial Engagement with Tribal governments is "vitally important to the successful deployment and provision of service" and attainment of universal service on Tribal Lands.

The simple process of bringing regulatory providers, receiving high-cost support, on Tribal Lands to "engage" Tribal Governments as consumers is

something that should have been taking place as a matter of sound business practice. There is no bottom-line delineation of “meaningful engagement” as that will be clarified through additional rulemaking.

The commercial engagement can be narrowly tailored and cost and regulatory burden can be minimized with proper consultation between ETCs, the FCC and the Tribal governments. In fact, such targeting and public interest obligation consultations may reduce long-term and overall costs of inefficient targeting and use of public funds—without meeting the universal service requirements of the Act.

There is a “reasonable fit” ⁴⁷in the engagement requirement to include the consumer Tribal government in planning the deployment of advanced regulatory service to previously underserved and unserved communities.

The Commission’s new requirements supports a “fair bargaining process”⁴⁸ between the ETC and the consumer, and invites a “fair bargaining process” in regulatory requirements between the Commission and Tribal Land ETCs.

III. Conclusion:

⁴⁷ City of Cincinnati v. Discovery Network, Inc, 507 U.S. 410 (1993).

⁴⁸ 44 Liquormart, Inc. v. Rhode Island, 116 S. Ct. 1495, 1507 (1996).

The National Telecommunications Association opposes the petition of the RLECs for reconsideration and urges the Commission to reject the petitioners' request for to repeal the Commission's proposed requirement for ETCs to advertise and engage with Tribal governments to improve the efficient use of Universal Service and Connect America Funds.

NTTA applauds the pro-active measures that the Federal Communications Commission has adopted. Without extraordinary measures and "out-of-the-box" regulatory solutions, nothing will change the disparity of service and technology on Tribal Lands. Moreover, the bare minimum measures proposed by NTTA of nation-to-nation consultation, of commercial "engagement" with Tribal governments, of adhering to Tribal right-of-way and business permitting, and of Tribal approval of ETCs, all support the self-sufficiency and sovereignty principles implicit in the Trust responsibility of the Federal Government to Tribal Nations. The hour is already late for Native communities to catch up with access to advanced communications services and technologies enjoyed by all other Americans. The Commission cannot turn back from its goal to establish communications parity for Tribal Nations. In fact the Commission must act more decisively, and with all deliberate speed, lest we lose an entire generation of Native youth to the digital and analog divide.

. Respectfully Submitted,

Darrell Gerlaugh

Chairman

National Tribal Telecommunications Association